SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 23 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962
No. 810

STATE OF WYOMING AND RICHFIELD OIL CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS.

W. M. HAIGHT,
Deputy Attorney General,
STERLING A. CASE,
Assistant Attorney General,
210 Capitol Building,
Cheyenne, Wyoming,
Attorneys for Petitioner State of Wyoming,

WM. J. DEMARTINI,
WM. D. FOOTE,
M. F. SCHADE,
555 South Flower Street,
Los Angeles 17, California,
Attorneys for Petitioner, Richfield Oil Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	PAGE
Re the "question" as stated by respondent	1
Re the "statement" of respondent	2
Re respondent's "argument"	6
Conclusion	13

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Cragin v. Powell, 128 U. S. 691	4, 7
Heydenfeldt v. Daney, 93 U. S. 634	9
Knight v. United States Land Association, 142 U. S. 161	4, 7
Michigan Land and Lumber Co. v. Rust, 168 U. S. 589	11
New Mexico v. Colorado, 267 U. S. 30	12
State of Michigan v. Jackson L. & S. R. Co., 69 Fed. 116	11
United States v. Aikins, 84 Fed. Supp. 260	6, 7, 8, 9, 10, 12
United States v. Livingston, 183 F. 2d 192	6, 12
United States v. Oregon, 295 U. S. 1	12
United States v. Wyoming, 331 U. S. 440	9

STATUTES

26 Statutes at Large, p. 222	1
United States Code, Title 28, Sec. 772	4, 7

IN THE

Supreme Court of the United States

October Term, 1962
No. 810

STATE OF WYOMING AND RICHFIELD OIL CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS.

This brief is in reply to the brief of the United States in opposition to the Petition for Writ of Certiorari, and is submitted for the purpose of showing certain misstatements and inaccuracies and to rebut the argument contained in respondent's brief:

Re the "Question" as Stated by Respondent.

The United States did not grant to Wyoming "two 'school sections' in every township" as stated by respondent at the top of page 2. It did grant to Wyoming "Sections 16 and 36 in every township." (26 Stat. 222.)

The statements that the "state officials either elected to retain the *original* sections or waived the State's right to do so and accepted resurveyed sections" is not

germane to the controversy, as no *original* sections are in issue. Only school sections created by and shown on *resurveys* are here involved and there is no evidence or finding by the District Court that the State ever waived its right to any resurveyed school sections or to the lands here in controversy, which are school sections shown on resurveys.

There is no evidence or finding by the District Court of "50 years of acquiescence in these elections and waivers" or that there has been any elections or waivers with respect to the lands in controversy or as to any school sections shown on resurveys.

The question is, of course, not whether "the State can validly assert title to both the original and the resurveyed sections" as suggested at page 2, but only whether it owns the school sections 16 and 36 shown on the *resurveys*. Title to the *original* school sections is not in controversy. For a proper statement of the question presented see Petition page 2. The District Court put it this way: "The sole question for decision is whether the disputed parcels lie within the Act of Admission of the State of Wyoming to the Union. (Petition App. 2.)

Re the "Statement" of Respondent.

At page 3 of respondent's brief, it mentions the Wyoming statute which directed the State Commission of Public Lands to "select and locate lands". This statute, of course, applied only to situations where the

State enjoyed a right of selection under some statute. Here, there was no right of selection, as Congress expressly designated the lands granted, to wit, "Sections 16 and 36 in every township". Only when these school sections were not available because of previous disposition was there any right of the State Commissioner to select other lands and that, of course, is not the case with respect to any of the lands here in controversy as they were all available to automatically pass to the State at the time of the approval of the resurveys.

At page 3 of its brief, respondent quotes portions of a resolution by the State Board of School Land Commissioners authorizing its officers "to waive the right of the State of Wyoming to Sections 16 and 36 . . . and accept similar numbered tracts, as resurveyed." Said resolution is wholly irrelevant and immaterial because —

1. The resolution pertained only to *original* sections (as to which there is no controversy in this litigation) and did not authorize waivers in respect to school sections shown on resurveys.

2. The Board never executed any waivers in respect to the lands here in controversy or in respect to any school section created by a resurvey.

There is no evidence or finding by the District Court to support respondent's statement at the top of page 4 that "the State actively participated in locating on the ground the school sections and other State lands under

the original surveys." Moreover, it is difficult to conceive how the State could so participate as the resurveying process is exclusively within the jurisdiction and control of the United States Land Office and it alone must conduct such resurveys according to law and federal regulations established by that office. There is no provision or room for State participation in these surveys or resurveys.

Cragin v. Powell, 128 U. S. 691 at 699;
Knight v. United States Land Association, 142 U. S. 161 at 176;
43 U. S. C. 772.

In *Knight v. United States Land Association*, the opinion of the Supreme Court said:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. *Cragin v. Powell*, 128 U.S. 691, 699, and cases cited."

Throughout the remainder of the respondent's brief, it speaks of elections and selections by the State of Wyoming. That the state officials made any such elections or selections is not supported by any evidence or findings nor is there any law or statute, either state or federal, which would permit the state officials to do so. As pointed out in the petition, all of the lands

here involved were available to pass to the State upon approval of the resurveys and they did so automatically without any act by either federal or state officials. The state officials had neither a right of selection or rejection. The only situation where the State has a right of selection is when the numbered school sections are not available to pass to the State at the time of approval of the survey or resurvey. No such situations are involved in the present litigation as all of the lands here were available to pass to the State. Therefore, no such elections or selections were made or could have been made as to the resurveyed sections in controversy.

References are also made to waivers, and yet no waivers were introduced in evidence as to any of the lands in controversy or any other resurveyed school sections and there is no finding by the District Court of any such waivers. Any and all discussions about waivers is, therefore, wholly irrelevant and immaterial.

At page 5 of its brief, respondent says the District Court "relied upon the state and federal dministrative acts at the time of the resurveys". There is absolutely nothing in the opinion of the District Court or its findings to support respondent's statement, nor is there any statement therein to indicate that the District Court considered any evidence in regard to administrative acts. In the last paragraph on page 5 of its brief, respondent admits that the District Court restricted itself to evidence relating solely to the tracts in issue. Inasmuch as there was no evidence introduced relating to the

tracts in issue from which administrative practice could be inferred, it necessarily follows that the judgment of the District Court was not and could not be founded upon the basis of administrative practice.

In view of the foregoing it is difficult, therefore, to understand how the Circuit Court could have concluded that there was administrative action when the District Court did not consider any evidence thereof and made no findings as to administrative action or any other findings from which it might be inferred.

These inaccuracies or irrelevant statements by respondent are called to the attention of the Court because they are the premises upon which the respondent's arguments are based; as the premises are false, the conclusions are necessarily likewise false.

Re Respondent's "Argument".

Respondent has failed to show that the decision in this case is not in conflict with the decisions of the Ninth Circuit in *United States v. Livingston*, 183 F. 2d 192, affirming *United States v. Aikins*, 84 Fed. Supp. 260.

The *Aikins* case cannot be distinguished on the basis that it involved an original survey and not a resurvey as suggested by respondent at page 6. The opinion in the *Aikins* case clearly and expressly says that the Granting Act applies to *resurveys* as well as original surveys (84 Fed. Supp. 260, 264). Moreover, the land involved in the *Aikins* case had, in fact, been surveyed

prior to the resurvey there in question and the Bureau of Land Management has so concluded. This conclusion is clearly shown in the letter from the Acting Director of the Bureau of Land Management to the Chief, Division of Adjudicators, Bureau of Land Management, dated September 25, 1950, of which this Court may take judicial notice. Regarding the *Aikins* case and the land involved in that case, said letter recites:

> "Our records show that Ts. 29 and 30 S. Rs. 20 and 21 E., MDBM, were originally surveyed in their entirety by Reed and other Deputy Surveyors in the period 1856 to 1857 as shown upon the plats approved April 27, 1869 and August 17, 1871. Those portions of these townships originally surveyed by Reed were resurveyed by Carpenter in 1893, as represented on the plats approved November 18, 1893 . . . We find Carpenter made a resurvey, not an original survey."

The *Aikins* case cannot be distinguished on the basis that the State participated in the resuveys here in question but not the one involved in the *Aikins* case. As heretofore pointed out, the exclusive jurisdiction and duty to make and approve the original surveys and resurveys was vested in the United States Land Office.

Cragin v. Powell, 128 U. S. 691, 699;

Knight v. United States Land Association, 142 U. S. 161;

42 U. S. C. 772.

The surveying procedures are set forth in the Manuals of Surveying Instructions prepared and published by the Land Office and its successor, the Bureau of Land Management. There is no statute or regulation which permits the State to perform or participate in making the resurveys. Moreover, there is no evidence whatever and no finding by the District Court that the State requested the resurveys or that it participated in conducting same. The attempt of respondent, at pages 6 and 7, to distinguish the *Aikins* case on the basis that the State participated in making the surveys is, therefore, wholly without merit.

At page 7 of its brief, respondent mentions waivers in respect to *original* school sections and then says: "Petitioners have never suggested any reason why those elections and waivers—upon which the State, the federal government and third parties have relied for 50 years—are not still conclusively binding upon the State". The answer is that such waivers related only to *original* school sections and *not to resurveyed* school sections. In any event, they only waived the right to have the original school sections located and segregated; such waivers merely indicated the State's willingness to accept the resurveyed school sections as being the best evidence of the location of the original school sections, which original sections could not be found. These waivers, therefore, are wholly immaterial because this litigation involves only *resurveyed* school sections as to which no waivers have ever been executed or authorized.

At the middle of page 8, respondent says:

> "Petitioners also do not object to the fact that the District Court considered and made findings on

> the conduct of state and federal officials in carrying out the resurveying program as it related to the particular tracts of land at issue in this case."

This statement is, of course, not true because the District Court made no such findings regarding the conduct of such officials nor was there any evidence of such conduct or practice offered relating to the parcels in issue or in respect to any school sections created by resurveys.

On page 9 of respondent's brief it makes the statement: "Nor is the Aikins decision any source of uncertainty". It is true that the Aikins decision is no source of uncertainty because is clearly holds that the Granting Act in California *did* convey the school sections as shown on resurveys, but the decision in this case, and its conflict with the *Aikens* decision, does create uncertainty. The District Court in this case held that the Granting Act of Wyoming *did not* convey the school sections shown on the resurveys, which is in direct conflict with the *Aikins* decision. The decision of the Circuit Court merely beclouded the issue by attempting to bolster the decision of the District Court on the basis of administrative practice as to which there had been no evidence or findings by the District Court. As there were fraudulent surveys in all of the land grant states, and as there were resurvey acts passed for resurveying in all of the land grant states, and as the federal government is required by law to uniformly administer its school grants in all of the states (*Heydenfeldt v. Daney*, 93 U. S. 634, and *United States v. Wyoming*, 331 U. S. 440), there can be no distinction made on the basis of purported administrative

practice. If it existed in one of the land grant states it did so in all, but the Court in the *Aikins* case found there was no consistent administrative practice, although administrative practice was strongly urged by the government in that case and the same surveying practices were followed in California and the other states as in Wyoming. The *Aikins* decision does not involve a limited or a unique situation; the correction of fraudulent and erroneous original surveys by resurveys took place in all the land grant states. Nevertheless, the *basic question* to be determined here does not relate to administrative practice. The basic question is whether the granting acts of the various states *did operate* to vest title in the state automatically to the school sections shown on the resurveys upon approval of the resurveys, as held in the *Aikins* decision, or whether they *did not so operate* as held by the District Court in this case. Until this question is resolved, there will be uncertainty of titles and litigation throughout the land grant states and, sooner or later, this basic question must come before the Supreme Court to be resolved.

In its petition (Pet. 12, 13), petitioners cited several decisions of the Supreme Court in support of its assertion that the decision of the Court of Appeals in this case is in conflict with said decisions of the Supreme Court, which decisions have consistently held that title to land, surveyed or resurveyed, subsequent to the Granting Act automatically vests in the State at the time of the acceptance of the survey or resurvey by the General Land Office. Respondent admits the foregoing rule, as established by these decisions (R. Br. 9), but then simply says that they are not in conflict with the de-

cision in the present case. It is significant, however, to note that respondent makes no attempt whatever to explain why there is no such conflict or why those cases and said rule are not controlling here. Instead, respondent ignores this conflict and apparently attempts to brush it aside by citing some other cases which it says govern. The cases cited by respondent, however, do not support the respondent's contentions or the judgment of the lower court.

Michigan Land and Lumber Co. v. Rust, 168 U. S. 589, and *State of Michigan v. Jackson L. & S. R. Co.*, 69 Fed. 116, cited by respondent (R. Br. 9), involved the Swampland Grant of 1850 (9 U. S. Stat. 519.) These cases did not involve any school grant or school section. They only concerned lands designated swamplands on an *original* survey and *not a resurvey*. Inasmuch as the present case concerns only school sections shown on *resurveys* and respondent concedes that the State owns the school sections shown on the *original* surveys, these cases are clearly not in point. Moreover, there is a very important difference between the school grant here involved and the said swampland grant. That difference is simply this: The title to school sections passes to the State under the Granting Act *immediately* upon the approval of a survey or resurvey which designates and identifies the school sections; no patent or further act is required. (See Pet. 12 and 13 for cases.) In the case, however, of the swampland grant, the act itself expressly provides that title to the lands *does not* pass under the act until a *patent* therefor is issued to the State by the United States. It is important to note that no patents were ever issued to the State for the lands litigated in the said cases cited

by respondent. Title to the swamplands remained at all times in the United States and, therefore, when it made a resurvey of the said lands prior to issuance of patent, it was entirely within its jurisdiction to correct the surveys in any way it chose for it was surveying its own lands and there were no vested rights. Clearly, in these two cases, where title had not passed from the United States to the State, the General Land Office had the right to correct the surveys, so that when the patents were issued the State would acquire title only to the lands which were described in the patents. There is nothing in the opinions in those cases which is inconsistent with the *Jordan*, *Aikins*, *Livingston* and other decisions relied upon by petitioners. Actually, those cases support petitioners' contentions for they indicate that the State acquired the title to the lands designated on the resurveys as swamplands just as petitioners contend that the State acquired title to lands designated upon the resurveys as school sections.

United States v. Oregon, 295 U. S. 1, cited by respondent (R. Br. 10), is wholly irrelevant and does not support respondent's contentions. In said action the United States sought to quiet title to unsurveyed lands underlying the waters of certain lakes. The principal issue was whether or not the lakes were navigable. No school section is involved; no federal grant is involved. The case is, therefore, not in point and does not support any contention of the respondent.

New Mexico v. Colorado, 267 U. S. 30, cited by respondent is an action between the State of New Mexico and the State of Colorado to establish and determine the proper location of the common boundary between said states. It does not involve any school sections or

federal grants and is, therefore, wholly irrelevant and does not in any manner support any contentions made by respondent. Moreover, there is nothing in any of the foregoing cases cited by respondent which is inconsistent with the rule established by the decisions of this Court as more particularly set forth at pages 12 and 13 of the Petition, which cases all hold that as to lands surveyed or resurveyed by the General Land Office subsequent to the Granting Act, title to the numbered school sections shown thereon passes to and vests in the State at the time of the acceptance by said office of the survey or resurvey.

Conclusion.

It is respectfully submitted that the Writ of Certiorari should be granted because the petition shows that this decision is in conflict with the decision of another Court of Appeals on the same matter and that the Court of Appeals, 10th Circuit, has decided an important question of federal law which has not been, but should be, settled by the Supreme Court and which is in conflict with applicable decisions of the Supreme Court, and respondent has failed to show otherwise.

W. M. HAIGHT,
Deputy Attorney General,
STERLING A. CASE,
Assistant Attorney General,
Attorneys for Petitioner State of Wyoming,
WM. J. DEMARTINI,
WM. D. FOOTE,
M. F. SCHADE,
Attorneys for Petitioner, Richfield Oil Corporation.

March, 1963.